BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. The Opinions of the Courts Below.

The only opinion below was that of the trial justice on the denial of the motion to dismiss the complaint after the verdict and the conditional granting of the motion to set aside the verdict (R., pp. 413-416). This opinion is not reported.

II. Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked are stated in the petition.

III. Statement of the Case.

The case history is summarized in the petition.

IV. Specifications of Errors.

Petitioner respectfully submits that the judgment in this case has been entered and affirmed against your petitioner erroneously in the following particulars:

1. Error in refusing to dismiss the complaint and permitting a recovery herein to a dependent niece where there was no allegation or proof that the deceased's parents did not survive him as required under Sections 51 and 59 of Title 45 United States Code Annotated, incorporated in the Jones Act (R., pp. 164, 338, 416).

2. Error in reserving decision on petitioner's motion to dismiss the complaint for lack of proof after respondent's case (R., p. 164).

3. Error in denying motion made to dismiss the complaint for lack of proof after respondent's case, at the conclusion of the entire case (R., p. 337).

4. Error in denying petitioner's motion to dismiss the complaint for lack of proof at the conclusion of the entire case (R., p. 338).

5. Error in denying petitioner's motion to dismiss the complaint for lack of proof and refusing to grant petitioner's motion to set aside the verdict unconditionally after the jury returned its verdict (R., p. 416).

6. Error in failing to set aside the verdict unconditionally because the uncontradicted and corroborated evidence conclusively established that the deceased was in charge of the work and the machinery, and that the conditions which caused the accident were created solely and proximately by him (R., p. 416).

7. Error in refusing to grant a motion for a mistrial because of respondent's prejudicial questions (R., p. 222).

Argument.

POINT I.

There are no facts sustaining the judgment as required under Sections 51 and 59, Title 45 of the United States Code Annotated and the Court erred in refusing to follow the decisions of this Court which hold that a dependent next of kin is not entitled to recover unless there is proof that the deceased left no parents.

The complaint and bill of particulars fail to allege that Frye left no surviving widow or children, nor is it alleged that decedent left no parents. Respondent was requested in Paragraph 28 of petitioner's order for a bill of particulars to

> "State what relatives, heirs at law and next of kin plaintiff's intestate left surviving him at the time of his death, giving their names and addresses" (R., p. 17).

and in his bill of particulars the respondent stated:

> "The plaintiff is not making any claim for other relatives, and hence this question is immaterial to this case" (R., p. 21).

The clear import in this allegation is that he left other relatives who would be entitled to recover under the Statutes, and petitioner has no knowledge that deceased's parents did not survive him.

The record is absolutely barren of any evidence from which even an inference may be drawn that decedent left no mother or father. It is axiomatic that the burden of proof is on the respondent, yet in his answering brief on appeal, page 39, in the

Appellate Division respondent conceded: "There is no proof that the deceased left no parents * * *".

The court correctly charged the jury by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, and admonished the jury to be very careful to remember the statutes upon which the action was based (R., pp. 344-346).

The pertinent portion of Title 45, Section 51 of the United States Code Annotated is as follows:

> "Every common carrier by railroad * * * shall be liable in damages * * *, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death * * *"

The clear verbiage of this statute has been consistently held to create three different groups of beneficiaries, each class of which excludes those following.

Sabine Towing Co. v. *Brennan, et al.,* 85 F. (2d) 478, C. C. A., page 484:

> "The statute (Section 1, 45 U. S. C. A. §51) creates three classes of beneficiaries: (1) The surviving widow or husband and children of the employee; (2) the employee's parents; and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and nondependent collaterals are not entitled to recover."

This Court has held that under this statute the last named beneficiaries can only recover upon proof of the absence of a prior class of beneficiaries.

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367, 372:

> "The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery."

See also

> *Beebe* v. *Moormack Gulf Lines, Inc.*, 59 F. (2d) 319. Cert. den. 287 U. S. 597.

The foregoing rulings have been enunciated in cases brought under similar statutes patterned on Lord Campbell's Act, as is the Federal Employer's Liability Act, upon which statute this action is founded.

> *Maitland* v. *Greenberg*, 182 App. Div. 929;
> *Boyle* v. *Southern R. Co.*, 36 Misc. 289;
> *Cole* v. *Mayne*, 122 Fed. 836;
> *Louisville, Evansville & St. Louis Consolidated Railroad Company* v. *Lohges*, 6 Indiana Appellate Reports 288;
> Tiffany, Death by Wrongful Act, pages 409-412;
> Lawyers Reports Annotated, 1916 Ed. 160.

The rule of damages is entirely different where a non-dependent mother or father is the beneficiary instead of a dependent niece. The fact that the niece was dependent increased the damages. Such depend-

ency should not preclude non-dependent parents from recovery. In other words, there is no proof in this case that the niece is the proper party entitled to recover damages.

Since the respondent failed to show that Frye was not survived by his parents, a contingency which is prerequisite to recovery by the niece, no recovery was possible under the statute and the decisions. In the absence of proof that Frye was not survived by his parents the jury utterly disregarded the court's charge in finding that the niece was entitled to recover and the trial court erred in refusing to dismiss the complaint, to which exception was duly taken (R., pp. 164, 338) and in refusing to set aside the verdict (R., pp. 413-416).

Respondent's failure to prove a cause of action under the statutes and decisions of this Court is so apparent that this Court would be justified in reversing the judgment for lack of proof on this petition for writ of certiorari. Such lack of proof would warrant a dismissal of the complaint. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U. S. 654.

POINT II.

The evidence was uncontradicted that the accident was solely the result of the negligence of the decedent.

The testimony of both respondent's and petitioner's witnesses was that Frye had direct charge and supervision of the unloading of the *Padnsay* on the day of the accident (R., pp. 33, 34, 94, 188, 236, 317). The uncontradicted evidence of petitioner's witnesses, and one of respondent's witnesses, was that Frye

was responsible for the proper condition of the tackle for the unloading (R., pp. 126, 188, 236). The uncontradicted testimony of respondent's own witness was that it was Frye's duty as Chief Officer to report any defects in the gear to the Chief Engineer to have them fixed.

> "Q. In case a piece of machinery under the jurisdiction of the chief officer goes wrong, something happens to it, in your experience it is his duty, is it not, to report it to the chief engineer? A. It is his duty to report the defects to the chief engineer, yes, that is customary practice" (R., p. 126).

Even if we assume that the jury disregarded the testimony that Frye made no report of any defects to the Chief Engineer, respondent failed to prove affirmatively that Frye did make such a report which respondent's own witness, Lytle, testified he should have done (R. p. 126). In the absence of testimony that he made such a report the blame for any defective tackle must rest squarely on the deceased. Furthermore, the testimony of petitioner's and one of respondent's witnesses was that it was Frye's duty to put a stopper or wire preventer on the boom prior to the accident to prevent it from falling and that this should have been done (R., pp. 204-205; 245-246; 331; 280; 301-302). Before he died the deceased admitted that the accident was his fault in that he gave an order to shift the gears which was wrong (R., pp. 191, 249, 262; Defendant's Exhibit 1, p. 396).

The law is well established that where a superior officer is responsible for and creates the conditions which result in his death there can be no recovery.

In a case practically on all fours with the present action this Court denied a writ of certiorari from a judgment of the United States Circuit Court of Appeals for the Second Circuit which held that a motion for a directed verdict for defendant should have been granted. *DeLuca* v. *Shepard S. S. Co.*, 65 Fed. (2d) 566; opinion modified, 67 Fed. (2d) 437; cert. denied, 291 U. S. 685.

In a case also brought under the Federal Employers' Liability Act where the facts showed that an engineer was killed as a result of his own negligence this Court in reversing the judgment, *St. Louis* v. *Simpson*, 286 U. S. 346, Judge Cardozo speaking for the court, said at page 350:

> "The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis* v. *Kennedy*, 266 U. S. 147, might have been written in this case. 'It was the personal duty of the engineer positively to ascertain whether any other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to use a perversion of the statute to allow his representative to recover for an injury due to his failure to act on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' See also *Unadilla Ry. Co.* v. *Caldine*, 278 U. S. 139; *Frese* v. *Chicago, B. & O. R. Co.*, 263 U. S. 1, 3; *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, 448."

See also

> *New York Central* v. *Marcone*, 281 U. S. 345;

West Kentucky Coal Company v. *Parker's*, 229 Kentucky 685;
Horse Creek Mining Company v. *Frazier's Administrators*, 224 Kentucky 211.

From the foregoing it is respectfully urged that the judgment should be reversed where it appears that the lower court reserved decision on petitioner's motion to dismiss the complaint after respondent's case, to which an exception was taken and in which it was specifically pointed out to the trial court that the facts showed that the accident was solely caused by Frye (R., p. 164). The trial court also erred when it denied this motion and a similar motion made at the conclusion of the evidence (R., pp. 337-338) and erred in failing to set aside the verdict unconditionally on the ground that it was contrary to the law, the facts and the evidence (R., p. 374).

POINT III.

The verdict was wholly induced by prejudice, improper questions and improper summation on behalf of respondent.

On the trial respondent read prejudicial questions from the deposition of Captain Seay, which was in his possession for approximately one and a half years prior to the trial (R., p. 184), the most damaging of which was as follows:

> "Q. And that their lawyers and their advisers profess to think that a couple of thousand dollars would be generous compensation for the life of Mr. Frye?" (R., p. 222).

This was not a question asked in the heat of trial. It was calmly read from a deposition.

When this question was read petitioner immediately moved for a mistrial which was denied and an exception taken (R., p. 222). Thereafter counsel made further statements emphasizing the importance of this implied admission of liability (R., pp. 222-223). Practically identical questions have been held to be a wilful attempt to influence the jury improperly in the courts of New York on the ground that they imply an admission of liability. The damage was not undone by the court's admonition to the jury to disregard the question. *Baesens* v. *New York Central Railroad Co.*, 201 App. Div. 191; *Manigold* v. *Black River Traction Co.*, 81 App. Div. 381; *Stein* v. *B'klyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. 309.

The judgment should also be reversed on the ground of prejudicial summation on the part of respondent's counsel which justified a reversal when he said

> "* * * For pain and suffering of the decedent from the time of injury to the time of death, and substantial verdicts have been sustained by our highest court, the Supreme Court of the United States. on that" (R., p. 342).

and again:

> "If your verdict is too large, the Court can remedy that. If it is too small, nothing can be done about that" (R., p. 343).

This practice has been vigorously condemned where an identical statement was made in summation.

> *Bagully* v. *Morning Journal Assn.*, 38 App. Div. 522.

This was an appeal from a jury verdict in favor of the plaintiff in a libel action. In summing up counsel for the plaintiff stated:

> "To show how juries give verdicts in libel suits, I have here a bound volume of Court of Appeals cases from the library and in the action entitled *Le Huray Sisters* the jury rendered a verdict for the plaintiff for $10,000."

The court immediately stated that such a statement by plaintiff's counsel was improper and should not be made to the jury after which the counsel withdrew his remark about the $10,000 and asked the jury not to consider it. Reversing the judgment and sending the case back for a new trial the Appellate Division, Hatch, *J.*, said, page 523:

> "There was no possible justification for the reference by the counsel for the plaintiff to the case in the Court of Appeals. It is not possible that any attorney can be so carried away in his zeal for the success of his client, or be so blinded in his sense of propriety, as to be unaware of the improper character of such matter. It was intended for no other purpose than to convey to the minds of the jury that in this class of cases the sum awarded as damages was always large."

The Court of Appeals of the State of New York in a recent case unanimously reversed a judgment because of prejudicial questions asked of prospective jurors by the District Attorney in a criminal action, *People* v. *Johnson,* 284 N. Y. 182, Sears, *J.*, saying, page 187:

> "The vice of the statements and questions of the District Attorney lies not primarily in the

> incorrectness of the statement that an appeal to the Court of Appeals is compulsory but in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunities for review. This suggestion is fundamentally unsound and vitiates the trial. No element of our judicial process must be more carefully protected than the function of the jury. The jury has nothing to do with appeals and applications for clemency. They lie in a wholly different field. The jurors have task enough to find the truth and proclaim it by their determination without regard to ultimate consequences. Nothing can be permitted to weaken the jurors' sense of obligation in the performance of their duties (*Cf. People* v. *Sherwood,* 271 N. Y. 427; *People* v. *Santini,* 221 App. Div. 139, aff. 246 N. Y. 612)."

So, too, in the present case the jury was given an incorrect statement of law when counsel for respondent told it that if its verdict was too large the court could remedy it, but if it was too small nothing could be done about it, to which an objection was duly taken (R., p. 343). See New York Civil Practice Act, Section 549. The jury apparently felt it had *carte blanche* and that an appeal could cut down the size of their sympathetic verdict, but that no court could increase it. The damage was in the utterance and impression created and was just as harmful as the statements in *People* v. *Johnson, supra.* Under the decisions in the foregoing cases it is respectfully submitted that the judgment should have been reversed and a new trial granted at least.

POINT IV.

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that the final determination by this Court of the questions involved is of the utmost importance to the state courts, to counsel and litigants who have recourse to them, and to the public generally.

It is believed that the judgment entered herein represents an erroneous application and an unfortunate misunderstanding of the Federal statutes involved and of the decisions of this Court.

Finally it is submitted that the lack of proof to substantiate the judgment is so apparent that this Court would be justified in reversing the judgment on this petition.

Respectfully submitted,

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